SUPREME COURT OF THE UNITED STATES

No. 92–466

BROOKE GROUP LTD., PETITIONER *v.* BROWN & WILLIAMSON TOBACCO CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June 21, 1993]

JUSTICE STEVENS, with whom JUSTICE WHITE and JUSTICE BLACKMUN join, dissenting.

For a period of 18 months in 1984 and 1985, respondent Brown & Williamson Tobacco Corporation (B&W) waged a price war against petitioner, known then as Liggett & Myers (Liggett). Liggett filed suit claiming that B&W's pricing practices violated the Robinson-Patman Act.[1] After a 115–day trial, the jury agreed, and awarded Liggett substantial damages. The Court of Appeals, however, found that Liggett could not succeed on its claim, because B&W, as an independent actor controlling only 12% of the national cigarette market, could not injure competition. *Liggett Group, Inc.* v. *Brown & Williamson Tobacco Corp.,* 964 F. 2d 335, 340–342 (CA4 1992).

Today, the Court properly rejects that holding. See *ante*, at 18–20. Instead of remanding the case to the Court of Appeals to resolve the other issues raised by the parties, however, the Court goes on to review portions of the voluminous trial record, and comes to

[1]"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ." 15 U. S. C. §13(a).

the conclusion that the evidence does not support the jury's finding that B&W's price discrimination “had a reasonable possibility of injuring competition.”[2] In my opinion the evidence is plainly sufficient to support that finding.

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[2]The jury gave an affirmative answer to the following special issue:

“1. Did Brown & Williamson engage in price discrimination that had a reasonable possibility of injuring competition in the cigarette market as a whole in the United States?” App. 27.

The jury made its finding after being instructed that “injury to competition” means “the injury to consumer welfare which results when a competitor is able to raise and to maintain prices in a market or well-defined submarket above competitive levels. In order to injure competition in the cigarette market as a whole, Brown & Williamson must be able to create a real possibility of both driving out rivals by loss-creating price cutting and then holding on to that advantage to recoup losses by raising and maintaining prices at higher than competitive levels.

“You must remember that the Robinson-Patman Act was designed to protect competition rather than just competitors and, therefore, injury to competition does not mean injury to a competitor. Liggett & Myers can not satisfy this element simply by showing that they were injured by Brown & Williamson's conduct. To satisfy this element, Liggett & Myers must show, by a preponderance of the evidence, that Brown & Williamson's conduct had a reasonable possibility of injuring competition in the cigarette market and not just a reasonable possibility of injuring a competitor in the cigarette market.” *Id.,* at 829–830.

The fact that a price war may not have accomplished its purpose as quickly or as completely as originally intended does not immunize conduct that was illegal when it occurred. A proper understanding of this case therefore requires a brief description of the situation before the war began in July 1984; the events that occurred during the period between July of 1984 and the end of 1985; and, finally, the facts bearing on the predictability of competitive harm during or at the end of that period.[3]

Background

B&W is the third largest firm in a highly concentrated industry. *Ante*, at 2. For decades, the industry has been marked by the same kind of supracompetitive pricing that is characteristic of the textbook monopoly.[4] Without the necessity of actual agreement among the six major manufacturers, "prices for cigarettes increased in lock-step, twice a year, for a number of years, irrespective of the rate of inflation, changes in the costs of production, or shifts

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[3]As the majority notes, the procedural posture of this case requires that we view the evidence in the light most favorable to Liggett. *Ante*, at 2. On review of a judgment notwithstanding the verdict, the party against whom the judgment is entered "must be given the benefit of every legitimate inference that can be drawn from the evidence." See C. Wright & A. Miller, Federal Practice and Procedure §2528, pp. 563–564 (1971).

[4]When the Court states that "[s]ubstantial evidence suggests that in recent decades, the industry reaped the benefits of prices above a competitive level," *ante*, at 3, I assume it accepts the proposition that a reasonable jury could find abnormally high prices characteristic of this industry.

in consumer demand." *Ante*, at 3. Notwithstanding the controversy over the health effects of smoking and the increase in the federal excise tax, profit margins improved "handsomely" during the period between 1972 and 1983.[5]

The early 1980's brought two new developments to the cigarette market. First, in 1980, when its share of the market had declined to 2.3%, Liggett introduced a new line of generic cigarettes in plain black and white packages, offered at an effective price of approximately 30% less than branded cigarettes. *Ante*, at 3. A B&W memorandum described this action as "the first time that a [cigarette] manufacturer has used pricing as a strategic marketing weapon in the U. S. since the depression era." App. 128. This novel tactic proved successful; by 1984, Liggett's black and whites represented about 4% of the total market and generated substantial profits. The next development came in 1984, when R.J. Reynolds (RJR), the second largest

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[5]An internal B&W memorandum, dated May 15, 1984, states in part:

"Manufacturer's price increases generally were below the rate of inflation but margins improved handsomely due to favorable leaf prices and cost reductions associated with automation. For example, Brown & Williamson's variable margin increased from $2.91/M in 1972 to $8.78/M in 1981, an increase of over 200%. In 1982, the industry became much more aggressive on the pricing front, fueled by a 100% increase in the Federal Excise Tax. Brown & Williamson's variable margin increased from $10.78/M in 1982 and *[sic]* to $12.61/M in 1983.

"The impact of these pricing activities on the smoking public was dramatic. The weighted average retail price of a pack of cigarettes increased 56% between 1980 and 1983 (from $.63 to $.98)." App. 127.

company in the industry, "repositioned" one of its established brands, Doral, by selling it at discount prices comparable to Liggett's black and whites. App. 117–118; *ante*, at 4.

B&W executives prepared a number of internal memoranda planning responses to these two market developments. See App. 120, 127, 157, 166. With respect to RJR, B&W decided to "follo[w] precisely the pathway" of that company, *id.,* at 121, reasoning that "introduction of a branded generic by B&W now appears to be feasible as RJR has the clout and sales force coverage to maintain the price on branded generics." *Id.,* at 145. Accordingly, B&W planned to introduce a new "branded generic" of its own, known as Hallmark, to be sold at the same prices as RJR's Doral. *Id.,* at 124, 142–144.

B&W took a more aggressive approach to Liggett's black and whites. It decided to launch its own line of black and white cigarettes with the "[s]ame style array" and list price as Liggett's, but with "[s]uperior discounts/allow-
ances." *Id.,* at 124. B&W estimated that its own black and whites would generate a "trading profit" of $5.1 million for the second half of 1984 and $43.6 million for 1985. *Id.,* at 125. At the same time, however, B&W, anticipating "competitive counterattacks," was "prepared to redistribute this entire amount in the form of additional trade allowances." *Ibid.* B&W's competitive stance was confined to Liggett; the memorandum outlining B&W's plans made no reference to the possibility of countermoves by RJR, or to the use of B&W's trading profits to increase allowances on any product other than black and whites.

This "dual approach" was designed to "provide B&W more influence to manage up the prices of branded generics to improve profitability," *id.,* at 123, and also the opportunity to participate in the economy market, with a view toward "manag[ing]

down generic volume." *Id.,* at 109. Notwithstanding its ultimate aim to "limit generic segment growth," *id.,* at 113, B&W estimated an aggregate potential trading profit on black and whites of $342 million for 1984 to 1988. *Id.,* at 146. Though B&W recognized that it might be required to use "some or all of this potential trading profit" to maintain its market position, it also believed that it would recoup its losses as the segment became "more profitable, particularly as it approaches maturity." *Ibid.*

B&W began to implement its plan even before it made its first shipment of black and whites in July 1984, with a series of price announcements in June of that year. When B&W announced its first volume discount schedule for distributors, Liggett responded by increasing its own discounts. Though Liggett's discounts remained lower than B&W's, B&W responded in turn by increasing its rebates still further. After four or five moves and countermoves, the dust settled with B&W's net prices to distributors lower than Liggett's.[6] B&W's deep discounts not only forfeited all of its $48.7 million in projected trading profits for the next 18 months, but actually resulted in sales below B&W's average variable cost. *Id.,* at 338–339.

Assessing the pre-July 1984 evidence tending to prove that B&W was motivated by anticompetitive intent, the District Court observed that the documentary evidence was "more voluminous and detailed than any other reported case. This evidence

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[6]On June 4, 1984, B&W announced a maximum rebate of $0.30 per carton for purchases of over 8,000 cases per quarter; a week later, Liggett announced a rebate of $0.20 on comparable volumes. On June 21, B&W increased its rebate to $0.50, and a day later, Liggett went to $0.43. After three more increases, B&W settled at $0.80 per carton, while Liggett remained at $0.73. See App. 327, 420–421.

not only indicates B&W wanted to injure Liggett, it also details an extensive plan to slow the growth of the generic cigarette segment." *Liggett Group, Inc.* v. *Brown & Williamson Tobacco Corp.,* 748 F. Supp. 344, 354 (MDNC 1990).

The 18–Month Price War

The volume rebates offered by B&W to its wholesalers during the 18-month period from July 1984 to December 1985 unquestionably constituted price discrimination covered by §2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. §13(a).[7] Nor were the discounts justified by any statutory or affirmative defense: they were not cost justified,[8] App. 525, were not good-faith efforts to meet the equally low price of a competitor,[9] and were not mere

[7]That quantity discounts are covered by the Act, and prohibited when they have the requisite effect on competition, has been firmly established since our decision in *FTC* v. *Morton Salt Co.*, 334 U. S. 37, 42–44 (1948).

[8]"*Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." §13(a).

[9]"*Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." §13(b).

The jury gave a negative answer to the following special issue:

"3. Did Brown & Williamson engage in price

introductory or promotional discounts, 91 Tr. 42.

The rebate program was intended to harm Liggett and in fact caused it serious injury.[10] The jury found that Liggett had suffered actual damages of $49.6 million, App. 28, an amount close to, but slightly larger than, the $48.7 million trading profit B&W had indicated it would forgo in order to discipline Liggett. See *supra*, at 4. To inflict this injury, B&W sustained a substantial loss. During the full 18-month period, B&W's revenues ran consistently below its total variable costs, with an average deficiency of approximately $0.30 per carton and a total loss on B&W black and whites of almost $15 million. App. 338–339. That B&W executives were willing to accept losses of this magnitude during the entire 18 months is powerful evidence of their belief that prices ultimately could be "managed up" to a level that would allow B&W to recoup its investment.

The Aftermath

At the end of 1985, the list price of branded cigarettes was $33.15 per carton, and the list price of black and whites, $19.75 per carton. App. 325. Over the next four years, the list price on both branded and black and white cigarettes increased twice a year, by identical amounts. The June 1989 increases brought the price of branded cigarettes to $46.15 per carton, and the price of black and whites to $33.75—an amount even higher than the price for branded

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discrimination in good faith with the intention to meet, but not beat, the equally low net prices of Liggett Group, Inc.?" App. 27–28.

[10]By offering its largest discounts to Liggett's 14 largest customers, App. 168–169, 174, B&W not only put its "money where the volume is," *Id.,* at 402, but also applied maximum pressure to Liggett at a lesser cost to itself than would have resulted from a nondiscriminatory price cut.

cigarettes when the war ended in December 1985. *Ibid.*[11] Because the rate of increase was higher on black and whites than on brandeds, the price differential between the two types of cigarettes narrowed, *ibid.*, from roughly 40% in 1985 to 27% in 1989. See 964 F. 2d, at 338.

The expert economist employed by Liggett testified that the post-1985 price increases were unwarranted by increases in manufacturing or other costs, taxes, or promotional expenditures. App. 525. To be sure, some portion of the volume rebates granted distributors was passed on to consumers in the form of promotional activity, so that consumers did not feel the full brunt of the price increases. Nevertheless, the record amply supports the conclusion that the post-1985 price increases in list prices produced higher consumer prices, as well as higher profits for the manufacturers.[12]

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[11] It is also true that these same years, other major manufacturers entered the generic market and expanded their generic sales. *Ante*, at 6–7. Their entry is entirely consistent with the possibility that lock-step increases in the price of generics brought them to a level that was supra-competitive, though lower than that charged on branded cigarettes.

[12] "Q Does this mean that the price increases, which you testified are happening twice a year, are used up in these consumer promotions?

"A Not by any stretch of the imagination. Although there has been an increase in the use of this type of promotional activity over the last four or five years, the increase in that promotional activity has been far outstripped by the list price increases. The prices go up by a lot; the promotional activity, indeed, does go up. But the promotional activity has not gone up by anywhere near the magnitude of the list price increases. Further, those price increases are not warranted by increasing costs, since the

The legal question presented by this evidence is whether the facts as they existed during and at the close of the 18-month period, and all reasonable inferences to be drawn from those facts, see n. 3, *supra*, justified the finding by the jury that B&W's discriminatory pricing campaign "had a reasonable possibility of injuring competition." See *supra,* at 2, and n. 2.

The Sherman Act, 26 Stat. 209, enacted in 1890, the Clayton Act, 38 Stat. 730, enacted in 1914, and the Robinson-Patman Act, which amended the Clayton Act in 1936, all serve the purpose of protecting competition. Because they have a common goal, the statutes are similar in many respects. All three prohibit the predatory practice of deliberately selling below cost to discipline a competitor, either to drive the competitor out of business or to raise prices to a level that will enable the predator to recover its losses and, in the long run, earn additional profits. Sales below cost and anticompetitive intent are elements of the violation of all three statutes. Neither of those elements, however, is at issue in this case. See *ante*, at 21 (record contains sufficient evidence of anticompetitive intent and below-cost pricing).

The statutes do differ significantly with respect to one element of the violation, the competitive consequences of predatory conduct. Even here, however, the three statutes have one thing in common: not one of them requires proof that a predatory plan has actually succeeded in accomplishing its objective. Section 1 of the Sherman Act requires proof of a conspiracy. It is the joint plan to

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manufacturing costs of making cigarettes have remained roughly constant over the last five years." App. 509.

restrain trade, however, and not its success, that is prohibited by §1. *Nash* v. *United States*, 229 U. S. 373, 378 (1913). Section 2 of the Sherman Act applies to independent conduct, and may be violated when there is a "dangerous probability" that an attempt to achieve monopoly power will succeed. *Swift & Co.* v. *United States*, 196 U. S. 375, 396 (1905). The Clayton Act goes beyond the "dangerous probability" standard to cover price discrimination "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce." §38 Stat. 730.

The element of competitive injury as defined in the Robinson-Patman Act is broader still.[13] See S. Rep. No. 1502, 74th Cong., 2d Sess., 4 (1936) (Act substantially broadens similar clause of Clayton Act).[14] The Robinson-Patman Act was designed to

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[13]See text of statute, n. 1, *supra*.

[14]One of the purposes of broadening the Clayton Act's competitive injury language in the Robinson-Patman Act was to provide more effective protection against predatory price-cutting. As the Attorney General's National Committee to Study the Antitrust Laws explained in its 1955 Report:

"In some circumstances, to be sure, injury to even a single competitor should bring the Act into play. Predatory price cutting designed to eliminate a smaller business rival, for example, is a practice which inevitably frustrates competition by excluding competitors from the market or deliberately impairing their competitive strength. The invalidation of such deliberate price slashes for the purpose of destroying even a single competitor, moreover, accords distinct recognition to the narrower tests of `injury' added to the price discrimination provisions of the Clayton Act through the 1936 Robinson-Patman amendments. The discrimination provisions in the original Clayton Act were feared by the legislators as inadequate to

reach discriminations "in their incipiency, before the harm to competition is effected. It is enough that they `may' have the prescribed effect." *Corn Products Refining Co.* v. *FTC*, 324 U. S. 726, 738 (1945) (internal quotation marks omitted). Or, as the Report of the Senate Judiciary Committee on the proposed Act explained, "to catch the weed in the seed will keep it from coming to flower." S. Rep., at 4.

Accordingly, our leading case concerning discriminatory volume rebates described the scope of the Act as follows:

> "There are specific findings that such injuries had resulted from respondent's discounts, although the statute does not require the Commission to find that injury has actually resulted. The statute requires no more than that the effect of the prohibited price discriminations `may be substantially to lessen competition . . . or to injure, destroy, or prevent competition.' After a careful consideration of this provision of the Robinson-Patman Act, we have said that `the statute does not require that the discrimination must in fact have harmed competition, but only that there is a reasonable possibility that they ``may'' have such an effect.' *Corn Products Co.* v. *Federal Trade Comm'n*, 324 U. S. 726, 742." *FTC* v. *Morton Salt Co.*, 334 U. S. 37, 46 (1948).

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check the victimization of individual businessmen by predatory price cuts that nevertheless created no *general* impairment of competitive conditions in a wider market. To reach such destructive price cuts endangering the survival of smaller rivals of a powerful seller was an express objective of the liberalizing amendments in the `injury' clause of the Robinson-Patman Act." Report of the Attorney General's National Committee to Study the Antitrust Laws 165–166 (1955) (footnotes omitted).

See also *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.,* 460 U. S. 428, 435 (1983) ("In keeping with the Robinson-Patman Act's prophylactic purpose, §2(a) does not require that the discriminations must in fact have harmed competition (internal quotation marks omitted).").

In this case, then, Liggett need not show any actual harm to competition, but only the reasonable possibility that such harm would flow from B&W's conduct. The evidence presented supports the conclusion that B&W's price war was intended to discipline Liggett for its unprecedented use of price competition in an industry that had enjoyed handsome supracompetitive profits for about half a century. The evidence also demonstrates that B&W executives were confident enough in the feasibility of their plan that they were willing to invest millions of company dollars in its outcome. And all of this, of course, must be viewed against a background of supracompetitive, parallel pricing, in which "prices for cigarettes increased in lock-step, twice a year . . . irrespective of the rate of inflation, changes in the cost of production, or shifts in consumer demand," *ante*, at 3, bringing with them dramatic increases in profit margins, see n. 5, *supra*. In this context, it is surely fair to infer that B&W's disciplinary program had a reasonable prospect of persuading Liggett to forego its maverick price reductions and return to parallel pricing policies, and thus to restore the same kind of supracompetitive pricing that had characterized the industry in the past. When the facts are viewed in the light most favorable to Liggett, I think it clear that there is sufficient evidence in the record that the "reasonable possibility" of competitive injury required by the statute actually existed.

After 115 days of trial, during which it considered 2,884 exhibits, 85 deposition excerpts, and testimony

from 23 live witnesses, the jury deliberated for nine days and then returned a verdict finding that B&W engaged in price discrimination with a "reasonable possibility of injuring competition." 748 F. Supp., at 348, n. 4; n. 2, *supra*. The Court's contrary conclusion rests on a hodgepodge of legal, factual, and economic propositions that are insufficient, alone or together, to overcome the jury's assessment of the evidence.

First, as a matter of law, the Court reminds us that the Robinson-Patman Act is concerned with consumer welfare and competition, as opposed to protecting individual competitors from harm; "the antitrust laws were passed for the protection of competition, not competitors." See *ante*, at 14 (internal quotations marks and emphasis omitted). For that reason, predatory price-cutting is not unlawful unless the predator has a reasonable prospect of recouping his investment from supracompetitive profits. *Ante*, at 13–14. The jury, of course, was so instructed, see n. 2, *supra*, and no one questions that proposition here.

As a matter of fact, the Court emphasizes the growth in the generic segment following B&W's entry. As the Court notes, generics' expansion to close to 15% of the total market by 1988 exceeds B&W's own forecast that the segment would grow to only about 10%, assuming no entry by B&W. *Ante*, at 24. What these figures do not do, however, is answer the relevant question: whether the prices of generic cigarettes during the late 1980's were competitive or supracompetitive.

On this point, there is ample, uncontradicted evidence that the list prices on generic cigarettes, as well as the prices on branded cigarettes, rose regularly and significantly during the late 1980's, in a fashion remarkably similar to the price change patterns that characterized the industry in the 1970's when supracompetitive, oligopolistic pricing admittedly prevailed. See *supra*, at 3; *ante*, at 3.

Given its knowledge of the industry's history of parallel pricing, I think the jury plainly was entitled to draw an inference that these increased prices were supracompetitive.

The Court responds to this evidence dismissively, suggesting that list prices have no bearing on the question because promotional activities of the cigarette manufacturers may have offset such price increases. *Ante*, at 25. That response is insufficient for three reasons. First, the promotions to which the majority refers related primarily to branded cigarettes; accordingly, while they narrowed the differential between branded prices and black and white prices, they did not reduce the consumer price of black and whites. See 33 Tr. 208–210. Second, the Court's speculation is inconsistent with record evidence that the semiannual list price increases were not offset by consumer promotions. See n. 12, *supra*. See also *ante*, at 7 ("at least some portion of the list price increase was reflected in a higher net price to the consumer"). Finally, to the extent there is a dispute regarding the effect of promotional activities on consumer prices for generics, the jury presumably resolved that dispute in Liggett's favor, and the Court's contrary speculation is an insufficient basis for setting aside that verdict.[15]

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[15]In finding an absence of actual supracompetitive pricing, the Court also relies on the testimony of Liggett executives, who stated that industry prices were fair. Illustrative is the following exchange:

"Q I want to know—yes or no—sir, whether or not you say that the price you charged for branded cigarettes, which is the same price you say everybody else charged, was a fair and equitable price for that product to the American consumer.

"A It's what the industry set, and based on that it's a fair price." App. 396.

The problem with this testimony, and testimony like

As a matter of economics, the Court reminds us that price-cutting is generally pro-competitive, and hence a "boon to consumers." *Ante*, at 13–14. This is true, however, only so long as reduced prices do not fall below cost, as the cases cited by the majority make clear.[16] When a predator deliberately engages in below-cost pricing targeted at a particular competitor over a sustained period of time, then

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it, is that it relates to the period before the price war, as well as after, see *id.,* at 392, when there is no real dispute but that prices were supracompetitive. ("[T]he profits in the cigarette industry are the best of any industry I've been associated with, very much so." *Ibid.*) Some of the testimony cited by the Court, for instance, is that of an outside director who served only from 1977 or 1978 until 1980, see 64 Tr. 51–56, cited *ante*, at 26; his belief in the competitiveness of his industry must be viewed against the "[s]ubstantial evidence suggest[ing] that in recent decades, the industry reaped the benefits of prices above a competitive level" to which the majority itself refers. *Ante*, at 3.

The jury was, of course, entitled to discount the probative force of testimony from executives to the effect that there was no collusion among tobacco manufacturers, App. 397–398, and that they had appeared before a congressional committee to vouch for the competitive nature of their industry, *id.,* at 623–631. The jury was also free to give greater weight to the documentary evidence presented, the inferences to be drawn therefrom, and the testimony of experts who agreed with the textbook characterization of the industry. See App. 640–645; R. Tennant, American Cigarette Industry 342 (1950).

[16]In *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U. S. 328, 339–340 (1990), for example, we noted that low prices benefit consumers "so long as they are above predatory levels." In *Cargill, Inc.* v. *Monfort*

price-cutting raises a credible inference that harm to competition is likely to ensue.[17] None of our cases disputes that proposition.

Also as a matter of economics, the Court insists that a predatory pricing program in an oligopoly is unlikely to succeed absent actual conspiracy. Though it has rejected a somewhat stronger version of this proposition as a rule of decision, see *ante*, at 18–20, the Court comes back to the same economic theory, relying on the supposition that an "anticompetitive minuet is most difficult to compose and to perform, even for a disciplined oligopoly," *ante*, at 17. See *ante*, at 28–31 (implausibility of tacit coordination

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of Colorado, Inc., 479 U. S. 104, 118 (1986), we recognized that price-cutting of a predatory nature is "inimical" to competition, and limited our approving comments to pricing that is "above some measure of incremental costs." *Id.*, at 117–118, and n. 12 (internal quotation marks omitted).

[17] *Utah Pie Co.* v. *Continental Baking Co.*, 386 U. S. 685, 696–698, and n. 12 (1967). See also *Lomar Wholesale Grocery, Inc.* v. *Dieter's Gourmet Foods, Inc.*, 824 F. 2d 582, 596 (CA8 1987) (threat to competition may be shown by predatory intent, combined with injury to competitor), cert. denied, 484 U. S. 1010 (1988); *Double H Plastics, Inc.* v. *Sonoco Products Co.*, 732 F. 2d 351, 354 (CA3) (threat to competition may be shown by evidence of predatory intent, in form of below-cost pricing), cert. denied, 469 U. S. 900 (1984); *D. E. Rogers Associates, Inc.* v. *Gardner-Denver Co.*, 718 F. 2d 1431, 1439 (CA6 1983) (anticompetitive effect may be proven inferentially from anticompetitive intent), cert. denied, 467 U. S. 1242 (1984). See generally *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238 (1918) (in determining whether rule violates antitrust law, "knowledge of intent may help the court to interpret facts and to predict consequences").

among cigarette oligopolists in 1980's). I would suppose, however, that the professional performers who had danced the minuet for 40 to 50 years would be better able to predict whether their favorite partners would follow them in the future than would an outsider, who might not know the difference between Haydn and Mozart.[18] In any event, the jury was surely entitled to infer that at the time of the price war itself, B&W reasonably believed that it could signal its intentions to its fellow oligopolists, see App. 61, assuring their continued cooperation.

Perhaps the Court's most significant error is the assumption that seems to pervade much of the final sections of its opinion: that Liggett had the burden of proving either the actuality of supracompetitive pricing, or the actuality of tacit collusion. See *ante*, at 23–27 (finding absence of actual supracompetitive pricing), 29–31 (finding absence of evidence suggesting actual coordination). In my opinion, the jury was entitled to infer from the succession of price increases after 1985—when the prices for branded and generic cigarettes increased every six months from $33.15 and $19.75, respectively, to $46.15 and $33.75—that B&W's below-cost pricing actually produced supracompetitive prices, with the help of tacit collusion among the players. See *supra*, at 13. But even if that were not so clear, the jury would surely be entitled to infer that B&W's predatory plan, in which it invested millions of dollars for the purpose of achieving an admittedly anticompetitive result,

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[18]Judge Easterbrook has made the same point:

"Wisdom lags far behind the market

. . . . .

``[L]awyers know less about the business than the people they represent . . . . The judge knows even less about the business than the lawyers."

Easterbrook, The Limits of Antitrust, 63 Tex. L. Rev. 1, 5 (1984).

carried a "reasonable possibility" of injuring competition.

Accordingly, I respectfully dissent.